

Client Alert

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HMDA Hints: What Purchasers of Mortgages Need to Know About their Potential HMDA Reporting Obligations

The Dodd-Frank Act's amendments to the Home Mortgage Disclosure Act (HMDA), along with the CFPB's 2015 amendment to Regulation C, the implementing regulation of HMDA, have brought HMDA compliance to the forefront for many mortgage industry participants in recent years. HMDA requires financial institutions to report data on not just applications received and loans originated, but also loans purchased. Notwithstanding the foregoing, and as discussed further below, institutions that purchase mortgage loans, but have not originated any loans in the last two years, generally will not be subject to HMDA reporting requirements.

Below, we outline some key considerations that purchasers of mortgage loans should consider when evaluating whether they and the loans they purchase are subject to HMDA reporting, and for purchasers that are subject to HMDA reporting requirements, some practical considerations for accounting for such requirements in mortgage loan purchase and sale documents.¹

What Types of Purchasers Are Subject to HMDA Reporting?

An institution is only subject to HMDA reporting requirements if it meets the definition of a "financial institution" under Regulation C. A "financial institution" under Regulation C can include a depository financial institution (i.e., a bank, savings association or credit union) or a nondepository financial institution (i.e., a for-profit mortgage lending institution other than a bank, savings association or credit union), although different institutional coverage criteria apply depending on whether an institution is nondepository or depository.

Whether a depository or nondepository institution, a loan purchaser will not be considered a "financial institution" under Regulation C unless it also originated a certain amount of loans in each of the preceding two years. Specifically, as of January 1, 2018, in each of the two preceding calendar years, the institution must have:

- originated at least 25 closed-end mortgage loans that are not excluded from HMDA coverage (see below for additional information on excluded transactions); or
- originated at least 500 open-end lines of credit that are not excluded from HMDA coverage (note that effective January 1, 2020, this threshold for open-end credit is reduced to 100 loans).

For a nondepository institution to meet the institutional coverage requirements, it must: (1) meet the loan-volume threshold outlined above; and (2) have had a home or branch office in a metropolitan statistical area (MSA) on the preceding December 31.

¹ This discussion covers purchases of closed mortgage loans where the purchasing entity has not reviewed the application or made a credit decision prior to purchasing.

For a depository institution to meet the institutional coverage requirements, it must: (1) meet the loan-volume threshold outlined above; (2) on the preceding December 31, have exceeded the CFPB's asset threshold test (which is published annually in the Federal Register, and is \$45 million for purposes of collecting 2018 data); (3) in the preceding calendar year, have originated at least one home purchase loan or refinancing of a home purchase loan, secured by a first lien on a 1-4 unit dwelling; (4) have had a home or branch office in an MSA on the preceding December 31; and (5) meet one or more of the following two criteria: (a) be federally regulated or insured; or (b) have originated at least one loan insured, guaranteed or supplemented by a federal agency, or that was intended for sale to Fannie Mae or Freddie Mac.

What Types of Loans Are HMDA-Reportable?

If a purchasing institution meets the institutional coverage requirements, then it must also evaluate whether the loans it purchases are "covered loans" under Regulation C. If the loans are not "covered loans," then such loans need not be reported.

As of January 1, 2018, a "covered loan" under Regulation C includes either a closed-end mortgage loan or an open-end line of credit that is not an excluded transaction. These terms are more specifically defined in Regulation C, but generally, this means that most consumer-purpose transactions secured by a dwelling are reportable. Some examples of dwellings include principal residences, second homes or vacation homes, investment properties, individual condominiums or co-op units, manufactured homes and multifamily residential structures or communities, such as apartment buildings. In contrast, business or commercial purpose loans or lines of credit are reportable only if they are for the purpose of home purchase, home improvement or refinancing.

Regulation C outlines a number of transactions excluded from HMDA coverage, such as agricultural loans, loans secured by vacant land and temporary financing. Some exclusions that may be of particular interest to secondary market investors include: (1) an interest in a pool of closed-end mortgage loans or open-end lines of credit; (2) the purchase of a partial interest in a closed-end mortgage loan or open-end line of credit; and (3) the purchase solely of the right to service closed-end mortgage loans or open-end lines of credit.

In addition, for purposes of Regulation C, a purchase does not include a temporary transfer of a covered loan to an interim funder or warehouse creditor as part of an interim funding agreement under which the originating financial institution is obligated to repurchase the covered loan for sale to a subsequent investor (i.e., repurchase agreements).

What are the Data Collection and Reporting Obligations of HMDA-Covered Purchasers?

For financial institutions subject to HMDA reporting requirements, one key challenge is identifying the nature and scope of reporting obligations under HMDA. The 2015 HMDA amendment greatly expanded the data fields that must be collected and reported by adding data points required by the Dodd-Frank Act and discretionary data points required by the CFPB, and also modifies some existing data points. New data points include, among others, borrower age, credit score, AUS information, unique loan identifier (ULI), property value, points and fees, borrower-paid origination charges, discount points, lender credits, loan term, prepayment penalty, nonamortizing loan features, interest rate and loan originator identifier. Entities purchasing covered loans are required to collect, record and report on these new and modified data points (to the extent they are applicable to purchased loans) for purchases that occur on or after January 1, 2018.

For some data points, Regulation C provides specific guidance for reporting on purchased loans, or allows purchasers to indicate that such data points are not applicable. For example, for purchased closed-end mortgage loans, covered purchasers report the unpaid principal balance at the time of purchase, as opposed to the amount of the loan. When reporting whether the property securing the loan

will be a principal residence, second residence or investment property, a covered purchaser can report “principal residence” unless the loan documents or application indicates otherwise. For purchased loans for which applications were received by the selling entity prior to the effective date of the TILA-RESPA Integrated Disclosure (TRID) rule (which was October 3, 2015), a covered purchaser need not report total loan costs, borrower-paid origination charges, discount points and lender credits.

In addition, covered purchasers are not required to report certain data for purchased loans. For some types of data, such as the application date, rate spread, the borrower’s credit score, any prepayment penalty term, the applicant’s monthly debt-to-income ratio, the ratio of debt secured by the property to the value of the property, the application channel and the automated underwriting system (AUS) used to underwrite the loan, a covered purchaser complies with the HMDA requirements by reporting “not applicable.” For certain other types of data, such as the borrower’s income, age, ethnicity, race and sex, a covered purchaser may, but is not required to, report such data, and can either report “not applicable” or provide the data if it so elects.

Finally, one significant new HMDA requirement is that as of January 1, 2018, each HMDA-reportable loan requires a Universal Loan Identifier (ULI). Covered institutions purchasing loans with a previously assigned or reported ULI must use the same ULI that was previously assigned or reported. If there is not an existing ULI (for example, if the loan was originated prior to January 1, 2018, or purchased from an institution that is not subject to HMDA reporting), the covered purchaser must assign the loan a ULI and record and submit it with its loan/application register (LAR).

Covered loan purchasers are required to record the data they collect on purchased loans within 30 days after the end of the calendar quarter in which the loan is purchased. Under the new rule, HMDA reporters remain obligated to report their HMDA LAR to the appropriate federal agency by March 1 following the calendar year for which the data was collected. Starting in 2020, larger-volume reporters (i.e., covered institutions that reported a combined total of at least 60,000 applications and covered loans in the preceding calendar year, excluding purchased covered loans) are required to report their HMDA LAR on a quarterly basis.

How do HMDA-Covered Purchasers Address HMDA Reporting Obligations in the Purchase and Sale Context?

Another challenge for HMDA-covered purchasers is obtaining complete and correct HMDA data from loan sellers (especially when the seller of the loan is not the originator) within the required timeframes. Because covered purchasers of closed loans did not originate the loans on which they are reporting, they must rely on HMDA data from the seller of the loan, which may be the originator or another purchaser of the loan.

The obligation of the seller to deliver HMDA data to the purchaser is typically addressed in a loan purchase and sale agreement. Covered purchasers should require that the seller provide the HMDA data within a specified time period following settlement, and may wish to require that the seller validate and confirm the HMDA data against the related mortgage file, and notify the purchaser of any discrepancies in such data. In addition, because not all data fields are required to be reported for loan purchases, and because the regulation provides specific instructions for some data fields in the purchase context (as discussed further above), covered purchasers should outline the specific data fields required to be reported by the seller, and, if desired, detailed notes regarding such data fields. Covered purchasers should also require sellers to provide HMDA data in an electronic format, as covered institutions are no longer able to use paper-based submissions starting with 2018 reporting.

In addition, covered purchasers often obtain representations and warranties from sellers as to the accuracy and completeness of the HMDA data. This ensures that the covered purchaser will have adequate recourse against the seller in the event the CFPB or another regulator assesses a penalty against the purchaser in connection with the purchaser’s failure to report (or failure to timely report)

HMDA data, or in connection with errors in the data that the purchaser reports that are the result of incomplete or incorrect data provided by the seller.

Author

Allison Botos Schilz
aschilz@HuntonAK.com

Contacts

Mike Nedzbala
mnedzbala@HuntonAK.com

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